Docket: 2004-2783(GST)G

BETWEEN:

FOLZ VENDING COMPANY LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 11, 2006, at Québec, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant:	Gaétan Drolet
Counsel for the Respondent:	Jade Boucher

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act* for the period from October 1, 2000, to June 30, 2002, notice of which bears the number 00000000172 and is dated June 11, 2003, is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 3rd day of April 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 20th day of February 2008.

François Brunet, Revisor

Citation: 2007TCC199
Date: 20070403
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BETWEEN:

FOLZ VENDING COMPANY LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] This is an appeal, under the general procedure, from an assessment by the Minister of National Revenue ("the Minister") dated June 11, 2003. The assessment stated that the Appellant should have collected, and paid to the Receiver General for Canada, the sum of $388,506.23 in Goods and Services Tax (GST) and Harmonized Sales Tax (HST) for the period from October 1, 2000, to June 30, 2002 ("the relevant period"). The GST and HST that the Appellant should, in the Minister's opinion, have collected and paid to the Receiver General for Canada during the relevant period were related to sales of candy, gumballs and toys by means of coin-operated devices designed to accept a total consideration of more than $0.25.

Facts

[2] During the relevant period, the Appellant sold candy, gumballs and toys by means of "single-coin" vending machines the mechanism of which was designed to accept only one denomination of coin, specifically, $0.25, $1 or $2 coins. These machines did not give back change.

[3] During the relevant period, the Appellant made a total of $9,465,402 in sales. Forty-four percent (44%) of these sales, that is to say, $4,164,776 worth of sales, were made by means of vending machines designed to accept a total consideration of more than $0.25.

[4] Forty-three percent (43%) of the Appellant's sales made by means of vending machines designed to accept a total consideration of more than $0.25, that is to say, a total of $1,784,904 worth of sales, were made in provinces where the 15% HST was applicable during the relevant period. In the Minister's opinion, the Appellant should have collected the HST on these sales and remitted it to the Receiver General for Canada. Since the Appellant did not collect and remit HST on these sales, the Minister determined, by notice of assessment for the relevant period, that the Appellant should have collected HST of $232,813.63 (15/115 x $1,784,904) and paid it to the Receiver General for Canada.

[5] Fifty-three percent (53%) of the Appellant's sales made by means of vending machines designed to accept a total consideration of more than $0.25, that is to say, sales totalling $2,379,873, were made in provinces where the 7% GST was applicable during the relevant period. In the Minister's opinion, the Appellant should have collected the GST on these sales and remitted it to the Receiver General for Canada. Since the Appellant did not collect and remit GST on these sales, the Minister determined, by notice of assessment for the relevant period, that the Appellant should have collected and remitted GST of $155,692.60 (7/107 x $2,379,873).

[6] During the relevant period, the Appellant claimed $563,892.12 in input tax credits related to the operation of its vending machines.

Issues

[7] The only issues are as follows:

(i) Did the tangible personal property or services, supplied by a "single-coin" vending machine designed to accept total consideration of more than $0.25 for the supply, constitute taxable supplies?

(ii) Does the Appellant have a defence of good faith against the penalties that were imposed on it under section 280 of the *Excise Tax Act* (ETA)?

Appellant's submissions

[8] In his oral submissions, counsel for the Appellant essentially reiterated the arguments which are set out in paragraph 6 of the Reply to the Notice of Appeal, and which read:

> [TRANSLATION]
>
> 6. This is an appeal from the Respondent's decision, which is based on subsection 165(3) of Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended. The Appellant's grounds of appeal are as follows:
>
> (a) The Appellant is actively engaged in the operation of single-coin mechanical vending machines.
>
> (b) The Appellant is a member of the Canadian Association of Kiddie Vendors (CAKV), and, since June 1990, has been trying, through that association, to have the government acknowledge that its single-coin mechanical devices cannot collect GST or HST.
>
> (c) The Respondent is not taking account of the technical limitations of the Appellant's machines, which cannot collect the consumption tax.
>
> (d) The Appellant is unable to program the single-coin mechanical vending machines or modify their mechanisms, and thus, while electronic multiple-coin machines can collect the tax, these single-coin machines cannot.

(e) Consequently, the Appellant is being made to bear the entire burden of a mandate that it does not have the technical means to carry out, and this means that it must pay, out of its own revenues, a tax that it cannot collect from the consumer.

(f) The Appellant is being made to absorb a direct cost increase of 15%, which is discriminatory and impossible for it to bear.

(g) It is discriminatory and unfair to require the Appellant to collect GST and HST, and it imposes an immense financial burden on the Appellant without permitting appropriate taxation.

(h) Two important considerations prevent the principle behind taxation from being applied: the agent's ability to collect the tax, and the agent's obligation to collect only such tax as the consumer has paid.

(i) The Appellant cites *Distribution Lévesque Vending v. The Queen*, [1997] G.S.T.C. 38 (Tax Court of Canada) where it was held, *inter alia*, that Distribution Lévesque Vending, which operated single-coin vending machines, was unable to collect the GST from consumers, and that it was unfair to make it bear the burden of this tax instead of placing the burden on the consumer.

(j) The federal government accepted the judgment of the Tax Court of Canada and adopted the Coin-Operated Devices Remission Order, SI/99-21, March 27, 1999, P.C. 1999-326, March 4, 1999, under the *Financial Administration Act.* The Order contains, *inter alia*, the following elements:

- the Order is in the public interest; and

- registrants who remitted the GST or were assessed in a context identical to that of Distribution Lévesque Vending are entitled to a rebate, which applies to GST, penalties and interest thereon.

(k) The Appellant submits that since it is impossible for it to collect the tax, it should be entitled to the same treatment as Distribution Lévesque Vending.

The law

[9] Section 165 of the ETA is the Goods and Services Tax provision. It provides that GST of 7% must be paid by the recipient of a taxable supply. Furthermore, it provides that the recipient of a taxable supply in a participating province must pay to Her Majesty the Queen in right of Canada, in addition to the GST, tax in respect of the supply calculated at the rate for that province on the value of the consideration for the supply (HST).

[10] Section 123 of the ETA defines "taxable supply" as a supply that is made in the course of a commercial activity. The term "supply" is defined as the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition.

[11] The ETA contains express exceptions to the general provision imposing the Goods and Services Tax. For example, Schedule V of the ETA pertains to exempt supplies, and Schedule VI of the ETA pertains to zero-rated supplies. During the relevant period, subsection 165.1(2) of the Act also provided an express exception to the general rule imposing the tax. It read as follows during the relevant period:

> 165.1(2) **Coin-operated devices** – Where the consideration for a supply of tangible personal property or a service is paid by depositing a single coin in a mechanical coin-operated device that is designed to accept only a single coin of twenty-five cents or less as the total consideration for the supply and the tangible personal property is dispensed from the device or the service is rendered through the operation of the device, the tax payable in respect of the supply is equal to zero

[12] As of April 1, 1997, that subsection replaced subsection 165(3.1) without retroactive effect. Subsection 165(3.1) read as follows:

> 165(3.1) **Coin-operated devices** – The tax payable in respect of a supply of tangible personal property dispensed from, or a service rendered through the operation of, a mechanical coin-operated device that is designed to accept only a single coin as the total consideration for the supply is equal to
>
> (a) zero where the amount computed in accordance with subsection (1) is less than $0.025;
>
> (b) five cents where the amount computed in accordance with subsection (1) is equal to or greater than $0.025 but less than $0.05; and
>
> (c) in any other case, the amount computed in accordance with subsection (1).

[13] In April 1996, following representations by the vending-machine industry, Parliament created a sort of exception to this obligation to pay the tax by enacting subsection 165(3.1), albeit without retroactive effect.

[14] Subsection 165(3.1) was replaced by subsection 165.1(2) because Parliament wanted to take the Harmonized Sales Tax into account and simplify this exception in that, as of April 1, 1997, it was essentially sufficient to verify whether the total consideration was $0.25 or less in order to determine whether the exception was applicable or not.

[15] Then came *Distribution Lévesque Vending (1986) Ltée v. The Queen* (1997), [1997] G.S.T.C. 38, 5 G.T.C. 1079 (T.C.C.), where Tremblay J.T.C.C. was of the opinion that it was not possible to collect the GST in respect of supplies made prior to April 1996 from machines that now meet the conditions listed in subsection 165.1(2) of the ETA. In view of the fact that the amendments were not retroactive, one can disagree with Judge Tremblay's decision as to whether Parliament intended to exempt supplies from these machines from the tax, but nonetheless, the Governor in Council did enact the Coin-Operated Devices Remission Order, P.C. 1999-326. The Order allows any registrant who has paid the GST in respect of a supply which was made between January 1, 1991, and April 23, 1996, and which would be exempt under subsection 165.1(2), to claim, within two years after the day on which the Order was made, a reimbursement of the GST paid. The Order was made on March 4, 1999.

[16] Section 168 of the ETA provides that the GST and HST are generally payable on the day that consideration for the taxable supply was paid or the day that it becomes due. Section 160 of the ETA, which is neither a taxing nor an exempting provision, specifies that where a supply is made, and the consideration therefor is paid, by means of a coin-operated device, the recipient is deemed to have received the supply, paid the consideration and paid the tax on the day that the consideration is inserted into the device, and the supplier is deemed to have made the supply, received the consideration and collected the tax on the day that the consideration is removed from the device.

[17] Sections 169, 221, 225 and 228 of the ETA essentially provide that a person who makes a taxable supply must, as an agent of Her Majesty in right of Canada, collect the tax payable from the recipient and remit it to the Receiver General for Canada.

Analysis and conclusion

[18] In the case at bar, I am of the opinion that the goods priced at more than $0.25 and sold by the Appellant during the relevant period were taxable supplies within the meaning of section 123 of the ETA, and that the GST or HST had to be paid by the recipient of the supplies concerned, as prescribed by section 165 of the ETA. The ETA contains no exception that could apply in the case at bar. Thus, the Appellant, as an agent of Her Majesty in right of Canada, had to collect and remit the GST or HST on the taxable supplies, and was entitled to the input tax credits associated with those supplies.

[19] In the case at bar, the Appellant was deemed, under section 160 of the ETA, to have made the supply, received the consideration and collected the tax on the day that the consideration was removed from the vending machine. It should be emphasized that it is of little importance whether the Appellant actually collected the tax, because the supplier is deemed by section 160 to have collected it. Thus, the Appellant had to pay this deemed tax to the Receiver General for Canada. Even if I had found that section 160 of the ETA did not apply to the case at bar and that the Appellant's vending machines were not coin-operated devices but mechanical devices in that they could accept only one denomination of coin and could not provide change, I would still have been of the opinion that the assessment in issue is valid, because the goods sold by the Appellant were taxable supplies within the meaning of section 123 of the Act and thus, the GST or HST had to be paid by the recipient of the taxable supplies, as contemplated in section 165 of the ETA. The Appellant therefore had to collect the GST or HST payable by all recipients of taxable supplies during the relevant period, and had to remit these taxes to the Receiver General for Canada under subsections 221(1) and 228(2) of the ETA.

[20] The financial or economic grounds that the Appellant has raised do not dispense it from the duty to collect and remit the tax. In *Roneson Enterprises Inc. v. Ontario (Minister of Finance)* [2005] O.J. No. 3179, the Ontario Superior Court made the following observations in this regard:

> 16. In any event, just because compliance with the Act may be difficult or may result in the imposition of a cap on the effective purchase price of products sold through the vending machines does not affect the legal duty of vendors to comply with the Act. If it should turn out that it is too difficult or insufficiently profitable for the Respondent to comply, it will have reassess the financial viability of conducting business through this type of vending machine and perhaps even stop doing so. It may seem harsh but, in law, there is no duty on the Appellant to facilitate this type of business or to help maintain its profitability.

[21] As for the imposition of a penalty under section 80 of the ETA, the Federal Court of Appeal reiterated, in *Corporation de l'École Polytechnique v. Her Majesty the Queen*,[1] that an Appellant must show that he acted with due diligence in order for the penalty to be set aside. In the same decision,[2] the Federal Court of Appeal emphasized the importance of not confusing the defence of due diligence with the defence of good faith:

> The defence of due diligence should not be confused with the defence of good faith, which applies in the area of criminal liability, requiring proof of intent or guilty knowledge. The good faith defence enables a person to be exonerated if he or she has made an error of fact in good faith, even if the latter was unreasonable, whereas the due diligence defence requires that the error be reasonable, namely, an error which a reasonable person would have made in the same circumstances. The due diligence defence, which requires a reasonable but erroneous belief in a situation of fact, is thus a higher standard than that of good faith, which only requires an honest, but equally erroneous, belief.

[22] In the same decision,[3] the Federal Court of Appeal also recognized that

> . . . [a]part from exceptions, mistakes in good faith and reasonable mistakes of law as to the existence and interpretation of legislation are not recognized as defences to criminal offences, nor to strict liability offences or prosecutions governed by the rules applicable in strict liability. However, two exceptions to the principle should be noted: officially induced mistake of law and invincible mistake of law.

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[1] *Corporation de l'École Polytechnique v. Her Majesty the Queen*, 2004 FCA 127, at paragraph 27.
[2] *Ibid*, at paragraph 29.
[3] *Ibid*., at paragraph 38.

[23] In my opinion, the Appellant knew that it had to pay the GST and HST to the Receiver General for Canada. There were no exceptions in the ETA apart from those related to vending machines requiring $0.25 or less. Moreover, there was no order concerning vending machines that were designed to accept more than $0.25 in consideration. Thus, the Appellant did not exercise due diligence.

[24] For these reasons, the appeal is dismissed, with costs.

Signed at Ottawa, Canada, this 3rd day of April 2007.

"Paul Bédard"

Bédard J.

Translation certified true
on this 20th day of February 2008.

François Brunet, Revisor

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APPEARANCES:

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